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No. 10-281

Supreme Court, U.S.
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In The
Supreme Court of the United States

JEROME K. LANNING, et al.,

Petitioners,

v.

PATRICK P. PILCHER, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Florida First District Court Of Appeal

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN C. DENT, JR.
DENT & JOHNSON, CHARTERED
3415 Magic Oak Lane
Post Office Box 3259
Sarasota, Florida 34230
Phone: (941) 952-1070
Fax: (941) 952-1094
jdent@dentjohnson.com

Attorney for Respondents, Timothy Smith, as Property Appraiser of Okaloosa County, Florida and Chris Hughes, Tax Collector for Okaloosa County, Florida and the City of Destin

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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The opinion of the Florida First District Court of Appeal, *Lanning v. Pilcher*, is reproduced in the Petitioners' Appendix ("Pet. App.") at App. A and is reported at 16 So. 3d 294 (Fla. Dist. Ct. App. 2009).

JURISDICTION

The Florida First District Court of Appeal entered its judgment on August 26, 2009. The Florida Supreme Court declined to accept jurisdiction of the case on May 26, 2010. *Lanning v. Pilcher*, 37 So. 3d 847 (Fla. 2010). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a) (2000), and Supreme Court Rule 10(c).

STATEMENT OF THE CASE

On November 3, 1992 (not 1995 as recited by Petitioners' Pet. 5) the voters of Florida approved a citizens' initiative commonly referred to as the Save Our Homes Amendment (SOHA). Art. VII, §4(d), Fla. Const. As the name indicates, it was to protect Florida families against inflation in real estate values caused by demand in the market. As recited by the Florida Supreme Court in *Zingale v. Powell*, 885

So. 2d 277, 281 (Fla. 2004), quoting from the District Court of Appeal First District:

> Both constitutional provisions reduce the tax burden on homestead property. The First District Court of Appeal has succinctly stated:
>
> > The purpose of the amendment is to encourage the preservation of homestead property in the face of ever increasing opportunities for real estate development, and rising property values and assessment. The amendment supports the public policy of this state favoring preservation of homesteads. Similar policy considerations are the basis for the constitutional provisions relating to homestead tax exemption (Article VII, Section 6, Florida Constitution), exemption from forced sale (Article X, Section 4(a), Florida Constitution), and the inheritance and alienation of homestead (Article X, Section 4(c), Florida Constitution).

Smith v. Welton, 710 So. 2d 135, 137 (Fla. 1st DCA 1998) (footnote omitted); *see also* Op. Att'y Gen. Fla. 02-28 (2002).

The Petitioners' statement defines the issue as pitting Florida residents and their homesteads against non-residents and their vacation homes. Pet. 1. The Florida ad valorem tax system, however, includes a tax roll comprised of all property with numerous classifications of property assessed at just

or full market value. Some of the classifications also enjoy a classified use value rather than full market value assessment. Art. VII, §4, Fla. Const.; §196.001, Fla. Stat. (2009). Other uses are eligible for various levels of exemption. Art. VII, §§3, 6, Fla. Const. The real property classifications include, in addition to all forms of residential property, commercial and industrial property, agricultural property, and all forms of tangible personal property including those classified for separate treatment. Art. VII, §§1, 3, 4 and 6, Fla. Const., §195.073, Fla. Stat.

Contrary to Petitioners' statement on page 2 of their brief, there was no "bubble" for any assessment year. Revenues do not increase simply because values go up. Each year a local tax roll for each levying jurisdiction is prepared as of January 1st (the taxing date) and each of those local governmental entities adopts an annual budget. §§193.023(1), 200.065, Fla. Stat. (2009). A millage rate is mathematically calculated separately for each entity to fund the current year budget. The rate neither goes up or down from the prior year, it is merely a mathematical relation of a current budget to the current tax roll. The rate could be a number lower than the prior year even though a budget went up. *Schleman v. Connecticut General Life Ins. Co.*, 9 So. 2d 197 (Fla. 1942).

However, the voters, when adopting the amendment, realized that the sharp value increases in all residential properties due to market forces from within and without the state was causing an inordinate shift in the tax burden to the value of residential

property which exceeded the average value increase of the entire tax roll including all classes of property. This obviously was not caused by the use or utility of the particular classification or classified use. *Zingale v. Powell,* 885 So. 2d 277 (Fla. 2004).

"The home has a long history of special significance in Florida law." *Osterndorf v. Turner,* 426 So. 2d 539 (Fla. 1983); *Snyder v. Davis,* 699 So. 2d 999 (Fla. 1997). The Florida constitution has contained three types of protection for many years, taxation, forced sale, descent and distribution. Art. VII, §10, Fla. Const. The amendment is a continuation of that protection. *Zingale,* 885 So. 2d at 281. When speaking about another amendment increasing the homestead exemption to $25,000.00, the Supreme Court of Florida stated, "In 1980, changes in the homestead tax exemption provisions were brought about by inflation and the concern that a Proposition 13-type provision could pass in Florida." *Osterndorf v. Turner,* 426 So. 2d at 54.

The Petitioners argue that any impact on Florida residents that own more dwellings than their residence from SOHA is *de minimis non curat lex.* They fail altogether to recognize that the tax roll is made up of all real and tangible personal property in the state on any given January 1st. §196.001, Fla. Stat. (2009).

Petitioners argue on page 3 of their Petition that "because of the residency requirements for homestead status in Florida, there are two distinct classes of homeowners: those who reside in Florida for more

than six months, and those who reside in Florida for less." There is no durational requirement to obtain homestead status. *Osterndorf v. Turner,* 426 So. 2d 539 (Fla. 1983). Any homeowner on January 1st, the tax date, qualifies whether they physically moved to the home on July 1st or December 31st of the prior year from in-state or out-of-state.

The classification does not relate to the status of the owner, but the use of the property. Both the legislature and the voters have, over the years, sought to protect various uses from the ravages of economic times. Early in our history, protection was given to all types of agricultural uses. Art. VII, §4(a), Fla. Const. More recently, the voters have granted classified use value restriction on new businesses and expansion of existing businesses, renewal energy source devices and historic properties, limiting value, because of use, as in the homestead treatment. Art. V, §§3, 4, Fla. Const.

ARGUMENT

I. THE CONSTITUTION HAS NOT BEEN VIOLATED BY SOHA IN EITHER THE COMMERCE CLAUSE OR ITS DORMANT COUNTERPART, OR THE PRIVILEGES AND IMMUNITIES CLAUSE

The Petitioners are attempting to invoke Supreme Court Rule 10(c) [28 U.S.C. §1257(a)] for a

question previously rejected by this Court. *Reinish v. Clark,* 534 U.S. 993 (2001).[1]

The state court decision determined there was no basis to reexamine the federal constitutional challenges because they had been previously rejected by Florida state courts in *Reinish,* and this Court in *Nordlinger v. Hahn,* 505 U.S. 1, 112 S. Ct. 2326, 120 L. Ed. 2d (1992). Petitioner attempted in state court, and now in this Court, to distinguish *Reinish* by arguing that it did not address article VII, section 4(c) of the Florida Constitution but only the homestead exemption, article VII, section 6 of the Florida Constitution. However, as the Florida First District Court of Appeal opined:

> The Reinishes assert that while they (and the class they seek to represent) are engaged in direct economic competition with Florida residents for the purchase of real estate, the challenged exemption affords those persons who establish a Florida permanent residence a clear and continuing economic advantage over non-residents. First eligible property is subject to an exclusion of the first $25,000.00 from ad valorem taxes. Second, any future increases in the assessed value of eligible property are limited to three per cent annually. Art. VII, §4, Fla. Const.; §193.155, Fla. Stat. (1997).

Reinish v. Clark, 765 So. 2d 197 at p. 213.

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[1] *Reinish v. Clark,* 765 So. 2d 197 (Fla. 1st DCA 2000), *rev. denied,* 790 So. 2d 1107 (Fla. 2001), *cert. denied,* 534 U.S. 993 (2001).

There was no important question of federal law that had not been settled by this Court at the time of *Reinish*, nor was there a conflict with this Court then and there is not one now. Since *Reinish* was rejected by this Court, no decision has been issued indicating a basis to accept jurisdiction now.

A. The Provisions of Florida's tax scheme for protection of the homestead are not directed at an activity of commerce, nor is there discrimination against non-resident owner.

Petitioners have predicated their federal claim of discrimination against interstate commerce on *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274 (1977) and its progeny. These cases relate to direct state taxation of an "activity" of interstate commerce and when it is constitutional. The four part test – i.e., "is applied to an *activity* with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State (emphasis added)," does not apply here. *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 279 (1977). The ad valorem tax and the exemption/classified use valuation is not an "activity" of interstate commerce.

In *Kahn v. Shevin,* 416 U.S. 351 (1974), this Court upheld an ad valorem tax exemption favoring widows as the protected class. The Court stated:

> We have long held that '(w)here taxation is concerned and no specific federal right, apart

> from equal protection, is imperiled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation.' *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359, 93 S.Ct. 1001, 1003, 35 L.Ed.2d 351. A state tax law is not arbitrary although it 'discriminate(s) in favor of a certain class . . . if the discrimination is founded upon a reasonable distinction, or difference in state policy, not in conflict with the Federal Constitution. *Allied Stores v. Bowers*, 358 U.S. 522, 528, 79 S.Ct. 437, 441, 3 L.Ed.2d 480.

See also, Citizens Telephone Company v. Fuller, 229 U.S. 322 (1913); *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356 (1973).

Ad valorem taxes and exemptions thereon are subject to scrutiny under the commerce clause and its dormant application. *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.,* 520 U.S. 564 (1997). Generally, this tax is not a direct tax on an activity of interstate commerce, but on the value of property of whatever nature in the State of Florida. §196.001, Fla. Stat. (2007). *Commonwealth Edison Company v. Montana,* 453 U.S. 609 (1981). If a separate tax were levied only upon the value of property owned by those conducting interstate operations, then the tax may be suspect, *Allied Stores of Ohio, Inc. v. Bowers,* 358 U.S. 522 (1959), especially if the state attempts to justify a taxation of commerce based upon those operations.

The tax treatment questioned in the case *sub judice* is an exemption together with a classified use value of the permanent homestead. Article VII,

Section 6, of the Florida Constitution limits the exemption to one per family unit, and therefore the restricted value of SOHA is so limited.

The cases relied upon by Petitioners are of a tax scheme affecting an "activity" of interstate commerce related to a specific deference in application non-resident owners involved in an activity of commerce. *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 279 (1977); *Okla. Tax Comm'n v. Jefferson Lines, Inc.,* 514 U.S. 175, 185 (1995); *Am. Trucking Ass'ns, Inc. v. Scheiner,* 483 U.S. 266, 283 (1987); *Dept. of Revenue v. Kuhnlein,* 646 So. 2d 717, 724 (Fla. 1994); *Armco, Inc. v. Hardesty,* 467 U.S. 638, 644-45 (1984); *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.,* 520 U.S. 564, 573 (1997); *West Lynn Creamery, Inc. v. Healy,* 512 U.S. 186, 194-95 (1994); *Boston Stock Exch. v. State Tax Comm'n,* 429 U.S. 318, 331 (1977); *Baldwin v. G.A.F. Seelig, Inc.,* 294 U.S. 511, 527 (1935). There is no such activity involved in using a property as one's home and the state protecting that right.[2]

In *Camps Newfound,* the court reviewed a state property tax challenged under Commerce Clause where a charitable exemption was excluded from entities operated for non-residents. The taxing authority argued that the Commerce Clause was not

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[2] The Petitioners suggest as another argument affecting interstate commerce, i.e., putting second-home buyers at a disadvantage. The contrary appears to be true. Those buying a second vacation home or merely speculating on Florida property have been the cause of the inflation giving rise to the justification for the protection.

applicable because the non-resident campers were not articles of commerce and that the commercial activity, if there is one, was entirely intrastate within Maine.

The Court rejected this argument finding the camp, though not for profit, was engaged in commerce and was a provider of goods and services. In essence the Court found a direct tax application on a commercial activity that was the subject of discrimination solely on the basis of its catering to non-resident recipients of its charitable services.

The Florida tax scheme challenged by Petitioners does not involve an activity of commerce. The class established for preferential treatment is the primary residence of a family and not directly or indirectly involving interstate commerce.

More importantly, those properties excluded from the class are all other property, real and personal in Florida, with indifference to the residence or domicile of the owner. As opposed to all the decisions cited by Petitioners, the taxing scheme makes no mention of the location of those excluded from the class.

The Florida Education Finance Program (FEFP), contrary to the assertions of Petitioners, is just another millage rate applied to each county tax roll each year to partially fund schools. Chapter 1011 Part II, Fla. Stat. (2009). There is no different treatment which affects the tax scheme involved than the levy by the counties and cities of Florida. The use, homesteads for Florida families, are not part of the commerce, and therefore, the petition presents no federal question.

B. There is no unequal taxation between residents versus non-residents which violates the Privileges and Immunities Clause of Article V of the Constitution

Petitioners' assertions claiming violation of the Privileges and Immunities Clause raises no new grounds for relief. The exemption classification is not based on residents versus non-residents. The classification furthers a legitimate interest, i.e., providing shelter for a family, and there are not two classes of Florida residents based upon durational difference.

The Court has held in the case cited by Petitioner, *Lunding v. New York Tax Appeals Tribunal,* 522 U.S. 287 (1998), that only discrimination against citizens of other states where there is not a substantial justifiable reason, but only the mere fact that they are non-residents, is precluded by the Privileges and Immunities Clause. In that case, the incidence of the tax on income earned in New York specifically targeted non-residents in calculating the apportionment for the tax.

Here, the challenged provisions, as previously set forth and argued, do not single out a different tax burden based upon residency. The classification is based upon use, the one primary home owned by a family. The property classifications such as commercial, industrial and agricultural do not treat the owners differently because of residency.

Even if there was a minimal burden on non-resident owners, the historical purpose of protecting

the home of a family made up of one or more individuals is a legitimate state purpose. There is no federal question which justifies jurisdiction in this case relating to the Privileges and Immunities Clause. *Zingale v. Powell,* 885 So. 2d 277 (Fla. 2004).

C. The Petitioners have failed to bring their challenge within the concept of the right to travel among the state.

Petitioners attempt to extend their Privileges and Immunities argument by incorporating a "right to travel" aspect. However, this attempt falls short of placing the provisions of the Florida taxing provisions within the requirements of a stated federal question.

First, the Petitioners submit that the third component of *Saenz v. Roe,* 526 U.S. 489 (1999) is violated because of the vagarious market for real estate. The real estate market grew significantly in the past but now we have seen a downward crash in values. According to the Petition, because non-residents moving to Florida were not there at the inception of the amendment, there is a durational violation of the right to travel in the sense of *Zobel v. Williams,* 457 U.S. 55 (1982) and *Shapiro v. Thompson,* 394 U.S. 618 (1969).

This argument has no relation to potential purchasers from another state. All Florida residents, whether recently moving to Florida or just buying their first home, opt into the market when they acquired a home after the effective date of the tax

provisions and continue to do so today. There is no discrimination, both are eligible for the exemption upon moving in.

Petitioners further claim reliance on the second of the three components of *Saenz*, i.e., the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second state. *Saenz v. Roe*, 526 U.S. at 500. This Court grounded this component on the first sentence of Article IV, Section 2 of the U.S. Constitution, and characterized the protections as not "absolute" but blocks discrimination where there is no distinction other than citizenship. As already presented, there is no in-state and out-of-state preference in the tax provisions, they apply equally to in-state residents and all classes of property.

Finally, the third component is not violated. The Petitioners attempt a venue qualification of the third component. When citizens leave any state, they leave behind all the things the state had to offer. Many states have a state income tax, Florida does not. When citizens return to Florida as permanent residents, they can immediately establish the status under the tax provisions, just like any new family already residing in Florida. Petitioners' suggestion is discrimination legerdemain.

II. THE PETITIONERS FAIL TO ESTABLISH A CONFLICT AMONG THE STATE COURTS OVER THE MEANING OF DISCRIMINATION IN THE SAME CONTEXT.

Petitioners stretch the imagination to support their assertion for a federal question because of conflict among the states over the "meaning" of discrimination under the Dormant Commerce Clause and the Privileges and Immunities Clause. The Petitioners provide a series of state court decisions finding that the issue of capping values for homesteads or granting exemptions thereon is not within the protected environment of those clauses on the basis of discrimination. *See also Citizens for Uniform Taxation v. Northport Public School District,* 608 N.W. 2d 480 (2000). The petition then creates a conflict of those decisions with state court decisions relating to a tax on commercial activity or business.

Finally, Petitioners make a nonsensical assumption regarding home ownership in Florida. Every Florida resident that owns a second (vacation) home *must* also own a homestead. Pet. 22. Many Florida residents reside as their principle residence in a rented dwelling, and there is no law or regulation that prohibits them from owning a vacation home or other investment property.

There has been no demonstration of any conflict among the states. They are all consistent with the

decisions of this Court. There is no federal question as a result of these rulings in state courts.

CONCLUSION

The Petitioners do not have and have not shown any of the stated reasons for granting jurisdiction nor do these show any other compelling reasons for granting the writ. The Petition should be denied.

Respectfully submitted,

JOHN C. DENT, JR.
Counsel of Record

DENT & JOHNSON, CHARTERED
3415 Magic Oak Lane
Post Office Box 3259
Sarasota, Florida 34230
Phone: (941) 952-1070
Fax: (941) 952-1094
jdent@dentjohnson.com

Attorney for Respondents, Timothy Smith, as Property Appraiser of Okaloosa County, Florida and Chris Hughes, Tax Collector for Okaloosa County, and the City of Destin

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